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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 343

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1113, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 36-47) is reported at 223 F. 2d 338. The findings of fact, conclusions of law, and order of the Board (J. A. 183-208)[1] are reported at 106 NLRB 1171.

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[1] "J.A." references are to the joint appendix in the court below; "Tr." references are to the original typewritten transcript of testimony.

JURISDICTION

The decree of the court below was entered on May 26, 1955 (Pet. 36). The petition for a writ of certiorari was filed on August 23, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether an employer may, upon the union's material breach of a collective bargaining agreement, elect to rescind the agreement without first complying with the requirements of Section 8(d) of the National Labor Relations Act, as amended.

2. Whether substantial evidence supports the Board's finding, affirmed by the court below, that certain employees, who were not present at the plant when a strike in breach of a collective bargaining agreement was called by the union, thereafter acquiesced in, ratified, and became parties to the action, rendering them subject to discharge.

3. Whether the Board and the court below properly found that the employer, whose employees went on strike in breach of contract, was not required to bargain with the union responsible for the breach until it received notification that the illegal strike had been terminated.

4. Whether substantial evidence supports the finding that the employer discharged employees, who engaged in an unprotected strike, and failed to recall others, who had been laid off, for nondiscriminatory reasons.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in the appendix to the petition for certiorari, pp. 33-35.

STATEMENT

I. The Board's Findings of Fact

A. *The 1952 strike in breach of the collective bargaining agreement*

Since 1937 petitioner ("UE") has been the recognized bargaining representative of employees of Marathon Electric Mfg. Corp. ("the company"), and UE and the company have been parties to successive collective bargaining contracts (J.A. 126-127, 184).

The last of these contracts, effective on July 31, 1951, for a one-year term, contained, *inter alia,* a union-shop clause, a grievance and arbitration clause, and a no-strike, no-lockout clause (J. A. 126, 184; 116-119, 122). The no-strike, no-lockout provision stated in pertinent part: "In view of the orderly procedure outlined in this agreement, the Union will not authorize or sanction any strike, stoppage, slow-down, or restriction of out-put. . . . In case [of] any such action . . . any or all of the employees taking part will be subject to discipline or discharge" (J. A. 126, 184; 122).

The contract further provided for an immediate general wage increase of 5 cents and, further, that "up to four (4) cents" "may be added to all job rates if permitted by government policy" (J. A. 129, 185; 121). The company thereafter put into

effect a wage increase totalling 7 cents (J. A. 129, 185; 99-100). The parties were unable to agree, however, whether express Wage Stabilization Board ("WSB") approval was required under existing regulations to grant the remaining 2-cent increase permitted by the contract (J. A. 129, 185; 14, 99-101). A joint Company-UE petition in this regard was filed with WSB in the fall of 1951, but, before being acted upon, was withdrawn by UE (J. A. 129, 185; 96-97, 100, 102). UE thereafter took the position that the remaining 2 cents in issue should be put into effect in the form of fringe benefits without obtaining WSB approval (J. A. 129, 185; 98-99, 101). The company rejected this proposal on February 27, 1952, since the contract did not provide for an increase in the form of fringe benefits; it offered, instead, to grant the remaining 2 cents as an increase in the base pay rate subject to WSB approval, as had been specified in the contract (J. A. 129-130, 185; 95-99, 101-102, 121).

The prior week, on about February 22, general membership meetings were held by UE at times permitting employees from all three plant shifts to attend during nonworking hours (J. A. 129; Tr. 87, 1480). By secret ballot the employees authorized the taking of a strike vote in the event one should be necessitated by future dealing with the company, and were informed by a UE official that the vote "was being taken to hold a club over the Company's head" (J. A. 129; Tr. 82-88, 1021-1022, 1480). At least some employees attending gained the impression that the vote had authorized the calling of a

strike, and information to this effect reached the company (Tr. 1021, 1147-1151, 1156, 1193-1194, 1353, 1369, 1398, 1404, 1408-1409).

The day after the company announced it would not modify the contract. February 28, UE officers and stewards on all three shifts met and voted to call a full membership meeting for 2 p. m. unless the company settled the pending issues or arranged to confer before that time (J. A. 130, 185; 31-33, 120, 544, 651, 861, 1281, 1471). Notification was to be given first shift employees at work by their stewards, and second and third shift employees, not due at the plant before 3 p. m., by radio announcements; in the event of company capitulation, members stationed at the hall were to head off any employees arriving in response to the radio announcements (Tr. 32, 35, 676).

At noon UE President Muelver notified Manager Keuchle that the company would have "until 1 o'clock to put the two cents into effect in some form or other," and, if it did not, Muelver would not "be responsible for the consequences" (J. A. 130, 185; 1358-1359). When Muelver called again shortly before 1 p. m., Keuchle replied that there had been "no change" in the company's position (*ibid.*).

Several spot radio announcements of the meeting, directed "to all members," were made by UE between noon and 1:30 p. m. (J. A. 130, 185; Tr. 34). The first shift employees then at work (who, like all the plant employees, were UE members) were notified of the impending walkout by their stewards, who gave no indication of how long the

walkout would last or when they were to return to work (J.A. 130, 185; 64-69, 73-81, 83-84, 86-89, Tr. 34). The employees, many of whom expressed doubts concerning the wisdom and legality of the action, were variously advised by Muelver, their stewards, and other UE officers that "this was going to be a long drag," that postponing the meeting to nonworking hours "wouldn't hold a club over the Company," and that, in the event the plant were shut down following the walkout, they would not "have to strike" (J. A. 131, 151-152, n. 20; 730, 1029, 1038, 1060-1061, 1135, 1141-1142, 1160, 1167, 1170-1171, 1174-1175, 1210, 1230).

At 2 p. m. all of the 446 employees in the plant, except a watchman, stopped work, walked out, and, with few exceptions, went to the UE meeting (J. A. 126, 130, 133-134, 185).[2] On leaving the plant employees indicated to their supervisors that the strike might be protracted and of indefinite duration (R. 131; 71, 84-85, 93, 94).

B. *The discharge of the strikers and the Company's refusal to bargain with UE*

About 30 or 40 minutes after the walkout the plant was shut down (J. A. 131-132, 186; Tr. 1251-1252, 1363). The continued operation of the plant with the second and third shifts alone, in the event those employees chose to report, would have been economically unfeasible since the company had been

[2] Of the 480 first shift employees, 34 were not present at the time the walkout occurred due to either having finished their work shift early or excused absences (J.A. 126, 133-134, 185).

given no indication, and had no means of ascertaining, when the first shift work stoppage would terminate (J. A. 130-131, 150, 185-186, 191-192; 99, 104-110).

While the gates were being closed the second shift watchman arrived and was admitted to the plant by a foreman (J. A. 127, 131-132, 136, 187; Tr. 647, 658-660, 923-924, 1254). Of the 49 second shift employees due to start work at 3 p. m., 20 who had not previously heard of the walkout arrived at the plant shortly before 3 p. m., were advised of the UE meeting by union stewards stationed in the vicinity, made no effort to speak to or request admittance from company representatives near the closed gates, and thereafter, with few exceptions, went on to attend the UE meeting (J. A. 132, 134-137, 186).[3]

At the UE meeting, which began at 2:30 p. m. and was attended by employees from all three shifts, discussion assuming that a strike was in progress continued until 3 p. m., when a steward arrived and announced the plant had been shut down (J.A. 131-132, 134-135, 137, 150, 186; 56, 65, 71-75, 78-81, 85-86, 88-89, 91-93, Tr. 37-38, 80, 111, 124, 649-650, 670-673, 700, 1025-1026, 1045-1046, 1181-1182, 1236, 1286). Prior to that time no UE official had indicated how long the stoppage would last and none of the second shift employees, due at work at 3 p. m., had left the meeting (J. A. 132,

[3] See also Tr. 166-170, 445, 448, 475-476, 481-482, 506-507, 526-527, 540-541, 544, 548-549, 557, 562-563, 623-624, 627, 646-653, 656-660, 664-669, 673-674, 686-690, 737-738, 746-747, 796-798, 800-808, 857-863, 882-883, 997-998, 1385).

134-135; Tr. 36-38, 492, 735-736, 1025-1026, 1041, 1052-1058, 1066, 1072, 1084, 1091-1092, 1131, 1136, 1479). Upon announcement of the shutdown, Muelver stated that the employees were locked out, and not on strike, and directed them to report at their regular shift (J. A. 132, 186; 37, 79-80, 112, 126, 700, 1472), a direction followed until revoked by UE on March 3, when a picket line was established (J. A. 127, 186; 42-43, 80-82, 112, 188, 396, 403-404, 583, 706, 715-717, 722, 837, 974, 989-992, 1043, 1386).

As employees were leaving the February 28 meeting, Bargaining Committeeman Weiland predicted UE would have the company's president "on his knees in a week or two" (J.A. 79). Following the meeting, and on the same day, UE twice requested that the company bargain, as UE President Muelver testified, in order "to resolve our differences to date" (J. A. 133, 186, 198; 15-16, 57-58, 112-113). The company was not advised on either occasion that the strike had terminated, received no notice to that effect, and did not reply (*ibid.*, J. A. 103).

The next day, February 29, the company sent a letter to every employee on its current payroll. After setting out the contract provision prohibiting all strikes and rendering "employees taking part" subject to discharge, it concluded (J. A. 137-138, 186, 193-194; 167-168):

> Since the action taken by the Union and its members Thursday afternoon was the second such violation resulting from irresponsible leadership, the Company has no alternative but to consider that all participants have for-

feited any rights as employees and are accordingly being removed from the Company payroll.

On March 3 the company, stating a strike was in progress at the plant, advertised for employees (J.A. 127, 186; 168). On March 5, the day after picketing of the plant by employees from all three shifts began (*supra*, p. 8), the company again sent a letter to all employees who had been on its payroll—except UE officers and stewards—urging them to reenter the company employ and notifying them the contract was being cancelled because of UE's breach in "causing this strike" (J. A. 138-139, 187; 168-169).

The company also wrote to UE on March 5 that it was cancelling the contract because of UE's breach, that "all employees who have taken part in the strike are discharged," and that UE would not thereafter be recognized as bargaining agent since it "no longer represent[s] a majority of our employees" (J. A. 187; 169-170). Thereafter, beginning on March 27, UE made a series of demands for bargaining. The company did not respond (J. A. 159, 199; Tr. 59-60, 116-120).

On August 27, the company again wrote to those employed on the second and third shifts, or who were absent from the first shift on February 28 when the walkout occurred, stating, in part (J.A. 173-174, Tr. 985-986):

> The claim recently has been made that Second and Third Shift employees did not participate in this strike. If you did not partici-

pate in the strike when it began or were not on strike when you received the letters of February 29th or March 5th, you should have so notified us promptly after receiving these letters and you should have reported for work in accordance with our letter of March 5th. You did not do so. You have never contacted us in any way since you received your letters. Your failure to report for work or to answer our letters indicated to us that you concurred in the action of Local 1113 and were a participant in the strike.

You know that our plant has been operating ever since March 18, 1952, and that ever since we have been advertising for help. You have never reported for work.

We want additional help in the plant and will sure put you on the job if you report for work.

None of the employees falling within these categories ever attempted to disassociate themselves from the strike action or to advise the company they had not shared in that action (J.A. 192-193, 194).[4] Almost all of them who testified at the hearing before the trial examiner and were questioned concerning the matter indicated that they would not have accepted any offer of reinstatement which did not include all the UE members who had engaged in the walkout, or which required them to

[4] Tr. 142, 149, 171, 200, 361, 392, 400, 443, 460, 470, 515, 525, 538, 595, 627, 801, 820-823, 845, 849, 947, 977, 992, 1297, 1385-1386, 1450-1452).

cross the UE picket line to work either with "scabs" or under terms other than those in the terminated UE contract (J.A. 194; 25-27, 31-33, 36-41, 44-45, 47, 49-56). The plant was still being picketed by UE when the hearing in the instant case began in October 1952 (J.A. 186; 49).

Prior to the strike (between November 1951 and February 28, 1952) the company had laid off a number of employees for economic reasons. The contract with the union required that laid-off employees be given priority in filling vacancies. When the company began to recruit employees, following the strike, it did not seek out and individually offer reemployment to those who had been previously laid off, the company claiming that the contract having been lawfully rescinded, it was no longer under an obligation to give laid-off employees the priority required by the agreement. So far as the record shows, no one who did apply was denied reemployment (J.A. 195-196; 169-173).

II. The Board's Conclusions and Order

Upon the facts summarized above, the Board found, in relevant part (J.A. 199), that UE's strike was in breach of the no-strike clause of the collective bargaining contract between UE and the company, and that the latter's cancellation of the contract was justified by the union's prior breach and did not constitute a violation of the Act. The Board further found (J.A. 191) that since the strike was an unprotected activity, the company had lawfully discharged all those employees who participated in the strike. In this connection the

Board also found (J.A. 193-195) that the company had lawfully discharged a group of employees who, although they were not present in the plant when the strike was called, had subsequently approved and ratified the unprotected strike action. The Board also found (J.A. 191-192) that the company's shut down of the plant on February 28, following the inception of the strike, did not constitute an illegal lockout since it was prompted solely by nondiscriminatory economic considerations. The Board rejected the claim (J.A. 195-196) that the company had discriminatorily refused and failed to recall the group of employees who had been laid off between November 1951 and February 28, 1952. The Board concluded that although these employees had had a right to recall and reemployment, that right was dependent upon the contract between the company and UE; that, inasmuch as the UE had breached the contract, and the company had lawfully rescinded it, the latter was no longer under any obligation to recall them; and that the company in declining to recall them had acted solely on the basis of the cancellation of the contract rather than, as alleged, on the basis of discriminatory reasons. Finally, the Board found (J.A. 198-201) that the company was under no obligation to bargain collectively with the union either on February 28, 1952, since the union had not given notice that it was terminating the unprotected strike, or on March 27 and thereafter when the union, as a result of the lawful discharges, had lost its representative status. Accordingly, the

Board dismissed the complaint in the foregoing respects (J.A. 205-206).[5]

III. The Decision of the Court Below

The court below concurred in all of the Board's findings of fact and conclusions of law, and affirmed the Board's order (Pet. 36-46). Rejecting petitioner's contention that termination of the contract by the company violated the Act, the court stated that (Pet. 39-40) the illegal "walkout was a material breach which justified the subsequent rescission of the contract by the Company," even if it were "assume[d] *arguendo* that the breach by UE was not in itself a complete termination of the contract." The court affirmed the Board's finding (Pet. 41-42) that the company had not violated the Act in discharging the employees who participated in the unprotected strike. With respect to petitioner's contention that certain employees, absent when the strike began, did not thereafter participate in the action and hence were unlawfully discharged by the company, the court found (Pet. 43) that the "question was one of fact, and there was evidence on the record as a whole to support the Board's conclusion" that "these employees * * * have acquiesced in, ratified, and become parties to their agent's action." The court further concluded that, since the "record supports

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[5] The Board found (J.A. 190-191) that the company violated the Act in various other respects and ordered appropriate remedial action. These findings are not in issue here, the company having complied with those parts of the order (Pet. 36).

a finding of ratification of the illegal strike activity as a factual matter," there was "no merit in [petitioner's] argument that the Board's decision * * * rested upon an inference of guilt from union membership" (Pet. 43). The court also rejected petitioner's claim that the discharges of these employees were discriminatorily motivated, and "not predicated upon the strike," stating that the "evidence does not support th[at] contention" (Pet. 42).

The court further concluded that the company's refusal to bargain on February 28 was not violative of the Act (Pet. 45). The court, rejecting petitioner's contrary contentions, found "supported by the record" the Board's conclusion that "on February 28 the Company had no notice of the termination of strike," and, in light of the legislative history of the Act, concurred with the Board's conclusion that the company, therefore, "was under no obligation to bargain" on that date (Pet. 44-45).

The court also affirmed the Board's findings that, with respect to the plant shutdown, the failure to recall previously laid-off employees, and subsequent refusals to bargain with the union, the company's actions were not discriminatorily motivated or violative of the Act (Pet. 43-44, 45-46).

ARGUMENT

1. The strike in the instant case, as the Board and the court below found, and petitioner concedes, was undertaken to compel modification of the currently effective bargaining contract, in violation of

the no-strike pledge (J.A. 157-158, 185-186, Pet. 12, 15, 40-41). The court below correctly concluded, affirming the Board, that in these circumstances the company was free to elect, as it did, to rescind the contract because of petitioner's prior material breach.

The decision fully accords with the settled rule, applicable to labor as well as other contracts, that "one party should not be required to perform if the other does not." *Restatement, Contracts* § 274, comment c.[6] A promise to refrain from striking "is the subject of considerable deliberation during contract negotiations and is often a concession for which the union exacts a substantial price from the employer." Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319, 330 (1951). The "assurance of uninterrupted operation during the term of the agreement" thus bargained for constitutes "[t]he chief advantage which an employer can reasonably expect from a collective labor agreement." S. Rept. No. 105, 80th Cong., 1st Sess., p. 16. Accordingly, the material breach of contract occasioned by a union's striking in derogation of a no-strike pledge clearly affords an employer who is himself blameless, as here, "a right of rescission" and leaves him free to declare his "election to terminate the entire labor relations contract."

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[6] Accord: 5 Williston, *Contracts*, §§ 1455, 1467 (Rev. Ed. 1937); *Boeing Airplane Co.* v. *I.A.M.*, 188 F. 2d 356, 357 C.A. 9), certiorari denied, 342 U.S. 821; *Boeing Airplane Company* v. *National Labor Relations Board*, 174 F. 2d 988, 990-991 (C.A. D.C.); *United Biscuit Co.* v. *National Labor Relations Board*, 128 F. 2d 771, 775 (C.A. 7).

Boeing Airplane Co. v. *I.A.M.*, 188 F. 2d 356, 357 (C.A. 9), affirming 91 F. Supp. 596, 608 (W.D. Wash.), certiorari denied, 342 U.S. 821.

Petitioner's contention (Pet. 12-17) that the company, despite the union's breach of the contract, could not rescind the agreement without first complying with Section 8(d) is insubstantial and presents no question warranting review by this Court.[7] That section is designed to afford parties to an existing collective bargaining agreement, when either seeks to modify or terminate it, an opportunity to negotiate a successor or modified contract, free from strike or lockout pressures for a prescribed period. The section clearly does not contemplate a situation where one party to such an agreement has committed a material breach which excuses the other from performance of its contractual obligations. The steps which Section 8(d) requires of a party seeking termination or modification of an existing agreement have no meaning in that situation. Thus, the section requires that the party seeking modification or termination shall continue in full force and effect all of the terms of the existing agreement for the prescribed period.

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[7] Neither *Mastro Plastics* v. *National Labor Relations Board*, No. 19, this Term, certiorari granted, 348 U.S. 910, nor *National Labor Relations Board* v. *Lion Oil Co.*, pending on petition for certiorari, No. 241, this Term, involves the question sought to be raised here. *Lion Oil* deals with the interpretation of the "waiting period" prescribed by Section 8(d) in a situation where that Section is clearly relevant. *Mastro Plastics* presents the question whether Section 8(d) applies to a strike called to protest an employer's unfair labor practices.

It also requires that such party offer to meet for the purpose of negotiating a new or modified contract. The machinery of Section 8(d) is thus geared to facilitating the orderly and peaceful renegotiation of contracts following notice of termination or modification. Obviously, that was not the situation here. And to give Section 8(d) the reading which petitioner urges, and require the employer in the instant case to adhere to the contract which the union had disregarded and offer to negotiate a successor agreement, would penalize the nonoffending party and permit the offending party to enjoy the benefits, and escape the obligations, of the agreement.[8] There is no rational basis for attributing such a purpose to Congress.

2. Petitioner further contends (Pet. 17-22) that the Board and the court below erred in finding that certain employees, not present at the plant when the strike was initiated, thereafter "acquiesced in, ratified, and bec[a]me parties" to the strike by "choosing to remain silent and taking no steps to disavow the action of their agent, despite the invitation from the Company to take such steps" (Pet. 42-43; J.A. 193-195). The question raised by peti-

[8] Petitioner's assertion (Pet. 15-16) that, under one suggested reading of Section 8(d), the union did not violate its provisions in calling the strike is self-defeating. For, if under that interpretation of Section 8(d), the union was not required to observe its requirements, by the same token neither was the employer, and petitioner's entire argument on this aspect of the case falls. Moreover, if Section 8(d) has any application to the instant case, petitioner, as the court below pointed out (Pet. 41), is hardly in a position to complain of the employer's failure to observe those requirements when the union itself ignored them.

tioner, as noted by the court below (Pet. 43), is merely "one of fact" and presents no issue warranting review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491.

The Board's finding, moreover, is adequately supported by the record as a whole. "Silence under circumstances when, according to the ordinary experience and habits of men, one would naturally speak if he did not consent, is evidence from which assent may be inferred."[9] Here, despite the implicit invitation in the company's letter of February 29 to do so, it is undisputed that not one of the employees absent from the plant at 2 p.m. on February 28 ever advised the company that he did not concur in the group strike action undertaken by his bargaining agent; that he had not joined and made common cause with those who had walked out of the plant; or, even after the plant reopened, that he, as a "non-participant" in the strike, wished to return to work (*supra,* pp. 8-10). In these circumstances, it was wholly "consistent with legal principles" for the Board and the court "to consider the strike action as having been ratified" (*Hamilton Foundry & Machine Co.* v. *International Molders & Foundry Workers,* 193 F. 2d 209,

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[9] *Crane Co.* v. *James McHugh Sons, Inc.,* 108 F. 2d 55, 59 (C.A. 10); *Wittlin* v. *Giacalone,* 171 F. 2d 147, 148 (C.A. D.C.); *Standard Oil Co.* v. *Lyons,* 130 F. 2d 965, 968 (C.A. 8); *Leviten* v. *Bickley, Mandeville & Wimple,* 35 F. 2d 825, 827 (C.A. 2); *Restatement, Agency,* Secs. 82, 83, 93, comment a, 94, comment a, b, c, 95; Mechem, *Outlines of the Law of Agency,* Secs. 102, 105; *Restatement, Torts,* Secs. 780, 785(b).

215 (C.A. 6), certiorari denied, 343 U.S. 966). This finding, as the Board and the court found (Pet. 43, J.A. 193-194), is further buttressed by other circumstances. The company's employees at the time of the walkout were members of a firmly established union in the plant; the walkout called by the union received the complete support of the large group of employees who were in the plant when it took place; there is no showing in the record of dissent from any of the employees who were not present; indeed, many of these employees subsequently expressed their complete accord with their union's action.

There is thus no merit in petitioner's assertion (Pet. 17, 18, 20) that the decision below rests upon the "principle of 'guilt by association' " and that the employees were found to have participated in the strike "by virtue of the sole fact of their union membership." Nor is there any conflict with those decisions, cited by petitioner (Pet. 17, 20-21), establishing that an individual union member cannot be charged, without more, with the misconduct of either his union or his fellow members. The fact that these employees were all UE members was but one of the many factors taken into consideration by the Board in finding that they themselves also became participants in the strike by acquiescing in and ratifying their union's action.

Similarly, no conflict is presented, as petitioner suggests (Pet. 20, 22), by the decision of the Wisconsin Supreme Court affirming the ruling of a state commission that certain of the company's

employees were entitled to unemployment compensation under local law. *Marathon Electric Mfg. Corp.* v. *Industrial Commission, et al.*, 269 Wis. 394, 69 N.W. 2d 573. The state tribunals plainly "did not have under consideration the effect of the Labor Management Relations Act" in determining the unemployment compensation eligibility of these employees, "and for that reason the case does not present the same issue as is presented here." *National Labor Relations Board* v. *Deena Artware, Inc.*, 198 F. 2d 645, 653 (C.A. 6), certiorari denied, 345 U.S. 906. Nor could that decision, predicated upon a wholly different record and one in which the Board did not participate in any capacity, either bind the Board or detract from the substantiality of the evidence supporting its findings here. *United Shoe Machinery Corp.* v. *United States*, 258 U.S. 451, 460; *United States* v. *Southern Pacific Co.*, 259 U.S. 214, 240; *United Brick & Clay Workers* v. *Deena Artware*, 198 F. 2d 637, 642-643 (C.A. 6), certiorari denied, 344 U.S. 897, rehearing denied, 344 U.S. 919.

3. Petitioner also urges (Pet. 23-27) that the court below erred in affirming the Board's holding (J.A. 198) that the company was under no obligation to bargain with UE on February 28 since the company had been given no notice that the illegal strike had been terminated. As noted by the court below (Pet. 44-45), the holding conforms to long established Board policy, effectuates express Congressional intent, and is clearly correct.

In the event of an illegal strike, the Board has consistently held that an employer has no duty to

bargain about the issues giving rise to the strike or the reinstatement of the strikers until notified that the strike has ended and the employees are willing to return to work.[10] Congress expressly approved as an "obviously * * * correct decision," which was "written into the Act" as amended, the Board's ruling in *Times Publishing Co.*, 72 NLRB 676, 683, that "a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude" a finding of a violation by the employer of his duty to bargain.[11] It can hardly be said that a union is seeking to "confer in good faith," as required by Section 8(d), when it seeks to compel an employer to bargain, as here, under the pressure of an illegal strike which, as far as the employer knows, is still in progress.

Contrary to petitioner's assertion (Pet. 24-25), the decision of the First Circuit in *National Labor Relations Board* v. *Highland Shoe, Inc.*, 119 F. 2d 218, is not inconsistent with the ruling below. The court there upheld the Board in its view that once employees have terminated an illegal strike and have returned to work, their employer is under a duty to bargain with their representative even though the previously existing contract was terminated by their unlawful action. 119 F. 2d at 220, 222, enforcing 23 NLRB 259, 268-273. The decision affords no support for petitioner's view

[10] *Higgins, Inc.*, 90 NLRB 184, 185; *Charles E. Reed & Co.*, 76 NLRB 548, 549-550; *Dorsey Trailers, Inc.*, 80 NLRB 478, 485-486, affirmed in relevant part, 179 F. 2d 589 (C.A. 5); *United Elastic Corp.*, 84 NLRB 768, 772.

[11] H. Rept. No. 245, 80th Cong., 1st Sess., pp. 27, 82. See also 93 Cong. Rec. 4363, 3641, 4766-4767.

that an employer is obligated to bargain when, as here, he has not even been notified that his employees are willing to abandon their illegal strike.

Petitioner's alternative claim (Pet. 26-27) that the company had notice on February 28 that the strike had terminated raises only a question of the sufficiency of the evidence to support the contrary conclusion reached by the Board (J.A. 198). The court below expressly found that the Board's "finding is supported by the record" (Pet. 45). "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 178. In any event, the Board's finding, sustained by the court below, is amply supported.[12] The very fact that petitioner twice contacted company representatives on February 28, but never mentioned that the illegal strike had been abandoned (*supra*, p. 8), demonstrates the insubstantiality of its present claim (Pet. 23) that the ruling below could in any way affect the "channel

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[12] Contrary to petitioner's suggestion (Pet. 26-27), the trial examiner, while finding that on February 28, UE, after being advised of the plant shutdown, had directed the employees to report, nowhere found that that fact had been communicated to the company by UE at any time it requested bargaining on that date (J.A. 158-159). Neither can the compliance by employees with UE's direction on the following day, February 29, supply the defect in notice, as petitioner further urges (Pet. 25-26), since their reporting, as the Board found (J.A. 194-195), fully comported with "a tactical maneuver on the part of UE" to continue the strike under the label of "lockout" and so shift the onus of its illegal conduct to the company (*supra*, pp. 5-6, 7-8).

of communication between an employer and the union" during an illegal strike.

4. Petitioner also contends (Pet. 28-31) that the Company's discharge of the strikers and failure to recall the laid-off workers was prompted by a discriminatory anti-union purpose and was not the consequence of the union's breach of contract. This purely evidentiary issue has been fully considered by the Court of Appeals, which found the Board's contrary conclusion "well grounded in the record" (Pet. 42). There is no occasion for further review.

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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